TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

272
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No. 537

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

SAMUEL GETTINGER AND HARRY POMERANTZ, TRADING UNDER THE FIRM NAME, ETC.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

FILED JULY 29, 1926

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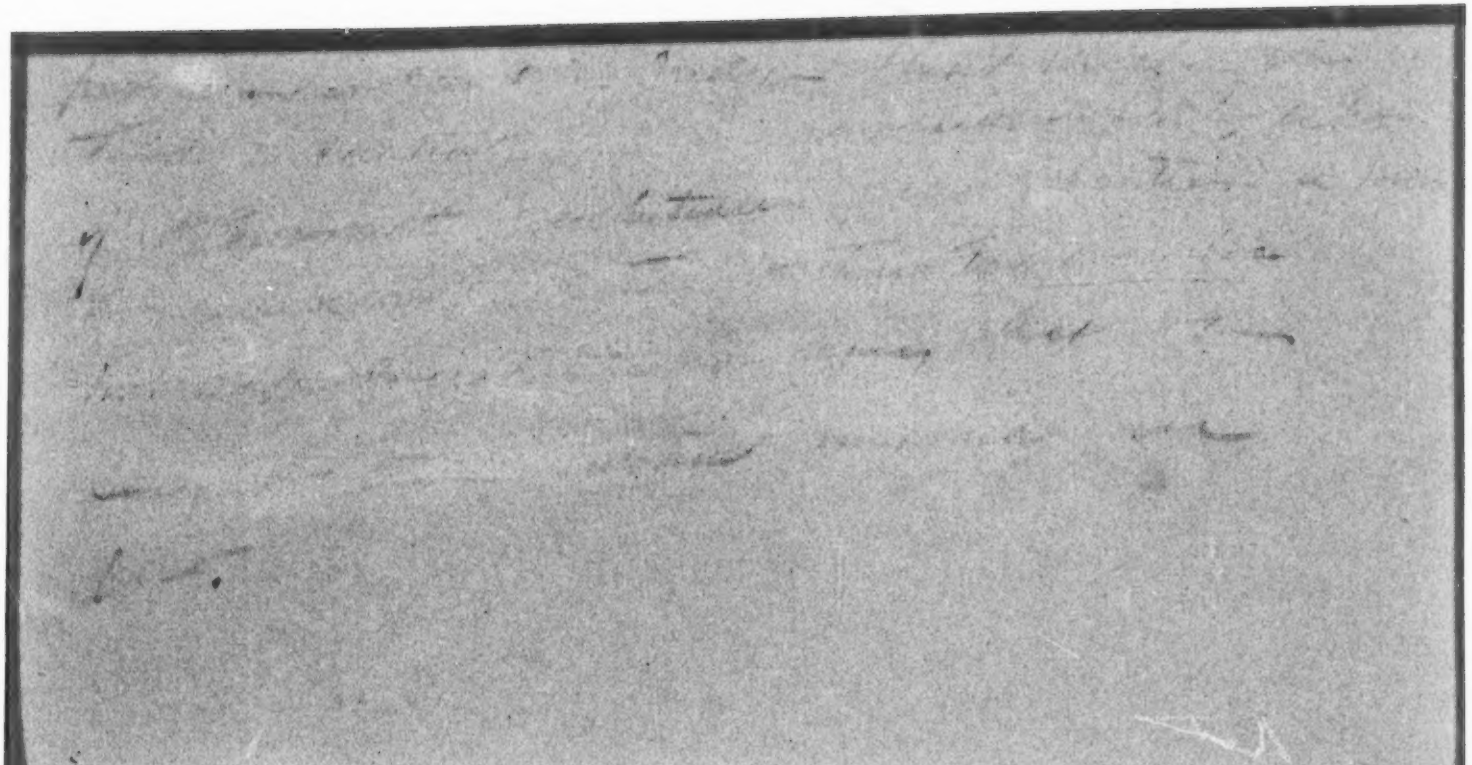

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1 United States District Court, Northern District of New York

SAMUEL GETTINGER AND HARRY POMERANTZ, TRADING UNDER THE FIRM name and style of The Paris Cloak and Suit Company, plaintiff

vs.

UNITED STATES OF AMERICA, DEFENDANT

Bill of complaint

Filed May 24, 1924

To the honorable United States district judges for the northern district of New York:

The claimants, plaintiffs and petitioners, Samuel Gettinger and Harry Pomerantz, trading under the firm name and style of The Paris Cloak and Suit Company, by Dugan & Bookstein, and Joseph Greenberg, their attorneys, respectfully show to this honorable court:

First. That they are citizens of the State of New York and of the United States of America, domiciled in said northern district of New York and over the age of twenty-one years.

Second. That at a regular term of the United States District Court for the Northern District of New York, held in the month of February, 1920, at Albany, New York, the grand jury then in session in and for said court duly empaneled for said term, pursuant to the statue in such case made and provided, and pursuant to law and the practice of this court, in form made and found and reported to said court, an indictment charging therein that these claimants had violated section #4 of the statue of the United States of

2 America, being chapter #53 of the 65th Congress of the United States, passed on August 10th, 1917, known as the Lever Act as amended by section #2 of chapter 80 of the 65th Congress, passed on October 22, 1919, in that they, the claimants had made unjust and unreasonable rates or charges in selling women's apparel in violation of the provisions of said section, whereby they, the said claimants were charged with the commission of a crime against the United States of America.

Third. That said claimants were thereupon brought before this honorable court and entered a plea of not guilty to said indictment, but thereafter and at a term of this court held on the 8th day of October, 1920, at Auburn, in said district, said claimants withdrew their pleas of not guilty and then and there entered pleas of nolo contendere and to said plea which was in writing, copies are hereto annexed and marked "Schedule A and B" and made a part of this bill, your claimants expressly reserved every right they might have to the fine to be imposed in the event that the so-called Lever Act, under the provisions of which the indictment was found, was discovered to be unconstitutional.

Fourth. That upon said plea of nolo contendere the court imposed sentence and the sentence of the court was that your claimants be fined the sum of five thousand ($5,000) dollars; that they be confined in jail until the said fine be paid and that pursuant to the judgment of the court, your claimants paid to the clerk of the United States Court for the Northern District of New York the sum of five thousand ($5,000) dollars which was by him deposited to the credit of the Treasury of the United States, and the said money of said claimants has been so retained from them.

3 Fifth. The United States Supreme Court, February 28th, 1921, held section #4 of the so-called Lever Act to be unconstitutional and null and void.

Sixth. That thereafter and after the rendering by said Supreme Court of said decision in said other similar and analogous cases, an order was made by this court and entered on the 25th day of April, 1924, by the terms of which order the indictment against your claimants was held in all respects to be null and void; the plea of nolo contendere which was entered on the 8th day of October, 1920, to said indictment was vacated, set aside, and held for naught to the same effect as if said indictment had never been returned. Whereby these claimants became and are placed in status quo as of a time prior to the time of finding of said indictment without charge, arraignment, trial, conviction, or other proceeding whatsoever against these claimants except that they have so far never been repaid or had returned said sum of five thousand ($5,000) dollars so exacted and required and now in the possession of the defendant.

Seventh. That by reason of the premises the defendant herein in judgment and as a matter of law, under section #24, subdivision #20, of the Judicial Code of the United States is obligated to repay to these claimants the sum of five thousand ($5,000) dollars with interest from the 8th day of October, 1920, the date when the defendant received the same, that said sum was by reason of the premises had and received by the defendant for the use and benefit of these claimants, and as the fund of these claimants, and is now due and payable by the defendant to these claimants, and that pursuant to the premises a contract was made and entered into between these claimants and the defendant, whereby defendant agreed

4 and is obligated to repay and return to these claimants the said sum of five thousand ($5,000) dollars and interest aforesaid, upon the cancellation of said judgment and the dismissal of said indictment and action; and these claimants allege upon information and belief that the defendant has failed and neglected upon demand duly made by them upon it therefor to repay said money.

Eighth. And these claimants further allege that this court has jurisdiction of said claim and action for the recovery of said money and has proven and it is its duty to award judgment for the recovery thereof, by virtue of section #24, subdivision #20, of the Judicial Code of the United States; duly enacted by the Congress of the United States and in force and applicable to this claim and

action, and that jurisdiction attaches of this claim and action in this court because of the fact that this claim and action is for the recovery from the said United States of a sum not in excess of ten thousand ($10,000) dollars and because the claim herein is based upon an implied contract of the Government of said United States to repay said sum, and is for the recovery of said sum, as liquidated damages, and is a claim based upon the Constitution of the said United States and the right of these claimants preserved thereby, and arose from the enforcement of a law of said Congress now determined to be void.

Wherefore these claimants, plaintiffs, and petitioners hereby demand judgment against the said United States, defendant herein, for the sum of five thousand ($5,000) dollars and interest thereon from October 8th, 1920, besides the costs of this action.

SAMUEL GETTINGER & HARRY POMERANTZ,
Claimants.

By DUGAN AND BOOKSTEIN,
Their attorneys. Office and Post Office Address, 50 State Street, Albany, New York.
JOSEPH GREENBERG,
Albany, New York, of Counsel.

Duly sworn to by Harry Pomerantz et al., jurat omitted in printing.

Exhibit to bill of complaint

Schedule A

United States District Court, Northern District of New York

UNITED STATES

vs.

SAMUEL GETTINGER, TRADING UNDER THE FIRM NAME OF PARIS CLOAK and Suit Store, and Harry Pomerantz

In consideration that the Attorney General and this court shall accept the plea nolo contendere which I hereby tender to the above-entitled indictment, I do hereby waive any and all claims which I now have or hereafter may have to any and all fines which the court may see fit to impose upon me upon such plea, except in the event that the so-called Lever Act under which said indictment is founded shall be declared unconstitutional by the Supreme Court of the United States.

Dated at Canton, New York, August 16, 1920.

SAM GETTINGER.

STATE OF NEW YORK,
County of St. Lawrence, ss:

On this 16th day of August, 1920, before me, the subscriber, personally appeared Samuel Gettinger, to me personally known and

known to be the same person described in and who executed the foregoing plea and waiver, and duly acknowledged the execution thereof.

C. W. Higgison,
Clerk, U. S. District Ct.

8 *Exhibit to bill of complaint*

Schedule B

U. S.

vs.

Harry Pomerantz, Impld., Etc.

In consideration of the acceptance of a plea of nolo contendere to the indictment for profiteering in the United States District Court of the Northern District of New York, I, Harry Pomerantz, one of the defendants above named, do hereby waive all rights which I may have to the moneys paid by me in payment of fines to be imposed upon me on acceptance of such plea and release the United States of America and all officers thereof from all claim to such money, except only in case the whole Lever Act be declared unconstitutional and void.

Dated Oct. 27, 1920.

Harry Pomerantz. [L. S.]

State of New York,
County of , *ss:*

On this 28th day of October, 1920, before me, the undersigned, personally appeared Harry Pomerantz, to me known and known to me to be the same person named in the foregoing waiver and he did acknowledge to me that he executed the same.

C. W. Higgison,
Clerk, U. S. District Court.

[File endorsement omitted.]

9 [Return on service of writ, omitted in printing.]

10–11 [Summons and sheriffs' return in usual form, filed May 31, 1924, omitted in printing.

12 In United States District Court

[Title omitted.]

Demurrer

Filed May 29, 1924

Defendant demurs to the bill and petition in this case for the reason that it fails to set forth a cause of action within the jurisdiction of this court.

Henry R. Follett,
Sp. Asst. United States District Attorney,
Attorney for Defendant.

[File endorsement omitted.]

13 In United States District Court

[Title omitted.]

Notice of motion for judgment

Filed June 25, 1924

Please take notice that a motion will be made at a special term of this court, held at the Post Office Building, in the city of Albany, on the 2d day of July, 1924, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order overruling the demurrer of the defendant, and for judgment on the pleadings and for such other and further relief as may be proper in the premises.

Dated the 24th day of June, 1924.

Yours, etc.,

DUGAN & BOOKSTEIN, AND
JOSEPH GREENBERG,
Attorneys for Plaintiffs.

To HENRY R. FOLLETT,
Special Assistant, U. S. Attorney,
Attorney for Defendant.

[File endorsement omitted.]

14 In United States District Court

[Title omitted.]

Order for judgment

Filed March 9, 1925

The above-entitled action having been commenced by due service of a summons and complaint on the 21st day of May, 1924, to recover the sum of $5,000 as a fine pursuant to the provisions of section 4 of the statute of the United States of America, being chapter #53 of the 65th Congress of the United States, passed on August 10th, 1917, known as the Lever Act as amended by section #2 of chapter 80 of the 65th Congress, passed on October 22, 1919, which section was declared unconstitutional by the United States Supreme Court, February 28th, 1921, and the United States attorney for the Northern District of New York having appeared and filed a demurrer to said complaint, and a motion having been made by the attorneys for the plaintiffs for judgment on the pleadings on the 24th day of June, 1924, and after due consideration the demurrer of the defendant having been overruled, and the defendant not desiring to plead over, a motion for judgment on the pleadings having been made by Joseph Greenberg, attorney for the plaintiffs, it is:

Ordered, adjudged, and decreed that the plaintiffs, Samuel Gettinger and Harry Pomerantz, have judgment against the United
15 States of America in the sum of $5,000, which sum was turned into the Treasury by the clerk of the United States court for

the Northern District of New York, and the same shall be certified to the Treasury of the United States by the clerk of this Court.

FRANK COOPER,
U. S. District Judge.

Albany, New York, March 9th, 1925.

[File endorsement omitted.]

16 In United States District Court

[Title omitted.]

Judgment

Filed March 9, 1925

The issues in this action having been decided on the pleadings, by the Honorable Frank Cooper, and an order rendering a verdict in favor of the plaintiffs against the defendant in the sum of $5.000 having been entered the 9th day of March, 1925, now, on motion of Joseph Greenberg, attorney for plaintiffs, it is hereby

Adjudged that the plaintiffs, Samuel Gettinger and Harry Pomerantz, duly recover *recover* from the defendant, the United States of America, the sum of $5,000.

C. W. HIGGISON,
Clerk.

[File endorsement omitted.]

17 In United States District Court

[Title omitted.]

Petition for writ of error

Filed April 13, 1925

And now comes the United States of America, a corporation sovereign, defendant in said original action, and plaintiff in error herein, by Oliver D. Burden, United States district attorney for the said northern district of New York, its attorney, and says and alleges:

That on or about the ninth day of March A. D. 1925, the said District Court of the United States of America within and for the Northern District of New York, entered a judgment herein in favor of said defendants in error, in said action wherein they were plaintiffs, and the plaintiff in error herein, the said United States of America, was defendant, and against this said plaintiff in error, then defendant, in which judgment and proceedings had prior thereto in this cause and action, certain errors were committed to the prejudice of said defendant in said action, said plaintiff in error, all

of which in more detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff in error, formerly defendant in said cause and action above entitled, prays that a writ of error may issue
18 out of this said court to the Supreme Court of the United States of America for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this said cause and action, duly authenticated, may be sent to the said Supreme Court of the United States of America. By direction of the Attorney General.

OLIVER D. BURDEN,
United States District Attorney for the Northern District of New York, Attorney for said Defendant, Now Plaintiff in Error, Office and Post Office Address: Federal Bldg., Syracuse, New York.

[File endorsement omitted.]

19 In United States District Court

[Title omitted.]

Order allowing writ of error

Filed April 13, 1925

This 9th day of April, A. D. 1925, comes the above-named defendant, United States of America, by its and their attorney, Oliver D. Burden, United States district attorney for the Northern District of New York, and files herein and presents to this court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the court does allow the writ of error, and the above-named defendant, United States of America, being a corporation sovereign, no bond shall be required of said defendant, and this writ alone shall operate as a supersedeas bond.

Done in open court, at the city of Albany, in the State of New York, and within the limits of the Northern District of the State of New York, this 9th day of April, A. D. 1925.

FRANK COOPER,
Judge of the United States District Court for the Northern District of New York.

[File endorsement omitted.]

20 In United States District Court

Writ of error

Filed April 13, 1925

The President of the United States of America to the Judge of the District Court of the United States for the Northern District of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea, and demurrer, which is the said District Court before you, between Samuel Gettinger and Harry Pomerantz, trading under the firm name and style of the Paris Cloak and Suit Company, plaintiffs, and the United States of America, defendant, a manifest error has happened to the great damage of the said United States of America, as by its complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, in the District of Columbia, on the eighth day of May next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States and of the Supreme Court thereof, the 13 day of April, in the year of our Lord, one thousand nine hundred and twenty-five, and of the independence of the United States of America the one hundred and forty-ninth.

[SEAL.] C. W. HIGGISON,
Clerk of the District Court of the United States for the Northern District of New York.

Allowed by:
FRANK COOPER,
United States District Judge.

21 Due service of the foregoing writ of error is hereby admitted and acknowledged at Albany, New York, this ———, day of ———, A. D. 1925.

———— ————,
Attorney for Samuel Gettinger and Harry Pomerantz, Trading Under the Firm Name and Style of The Paris Cloak & Suit Company, the Above-Named Plaintiffs in the District Court of the United States, and Defendants in Error in the Supreme Court of the United States.

[File endorsement omitted.]

22 In United States District Court

[Title omitted.]

Assignments of errors

Filed April 13, 1925

The United States of America, defendant in the above-entitled action, in connection with and as part of its petition for a writ of error filed herein, makes the following assignment of errors, which it avers and alleges were committed by the said District Court of the United States of America, within and for the Northern District of New York, in the rendition of the judgment against this plaintiff appearing from the record herein, that is to say:

First. The said District Court erred in overruling and denying the demurrer of the said defendant to the complaint, declaration, and petition of the said plaintiffs in this action;

Second. The said District Court erred in holding and deciding that the complaint, petition, and declaration of said plaintiffs stated and alleged facts sufficient to constitute a cause of action against the said defendant.

Third. The said District Court erred in not holding and deciding that said complaint, petition, and declaration of the said plaintiffs failed to set forth a cause of action within the jurisdiction of this said District Court.

Fourth. The said District Court had no jurisdiction of the subject matter of said action.

Fifth. The said District Court had no jurisdiction of the person or body politic and corporation of the said United States of America.

Sixth. The said District Court erred in entering judgment against this said defendant, the United States of America, whereas judgment ought to have been rendered and entered in favor of this said
23 defendant and against the said plaintiffs, by the dismissal of said cause and action.

Seventh. The said cause and action should have been dismissed by the order of said District Court.

Eighth. There are other fundamental and manifest errors in the said record of this case disclosed.

Exceptions were duly made in apt time to all of the said errors committed by said District Court.

By direction of the Attorney General.

UNITED STATES OF AMERICA.
By OLIVER D. BURDEN,
United States District Attorney for the Northern District of New York, Its Attorney, Whose Office and Post Office Address is Federal Building, Syracuse, New York.

[File endorsement omitted.]

24 [Motion in usual form showing service on Joseph Greenburg, filed April 18, 1925. Omitted in printing.]

25 In United States District Court

[Title omitted.]

Stipulation to abide by decision in Chenango Valley Grocery case

Filed April 18, 1925

It is hereby stipulated and agreed by and between the parties to the above-entitled action, represented by their respective attorneys that—in case proceedings in error shall be instituted by the said defendant in the Supreme Court of the United States of America to reverse and set aside the judgment of the said District Court of the Northern District of New York, made and entered in the above-entitled cause and action on or about the ninth day of March, A. D. 1925, in favor of the above-named plaintiffs and against the above-named defendant, on the ground that said district court had no jurisdiction of said cause and action—the rights of the aforesaid parties to this action and cause, shall and will be finally determined in what is known as the Chenango Valley Grocery case, which is now pending upon appeal or proceedings in error in the said Supreme Court of the United States, and the parties hereto shall abide by the decision of said Supreme Court in said other action,
26 which will determine whether or not the district courts of the United States of America have jurisdiction of such causes and action as the said instant and above-entitled cause and action.

Dated April 13, 1925.

JOSEPH GREENBERG,
Attorney for Said Plaintiffs,
82 State Street, Albany, New York.
OLIVER D. BURDEN,
U. S. District Attorney, Federal Building,
Syracuse, New York, Attorney for Said Defendant.

[File endorsement omitted.]

27 In the United States District Court

[Title omitted.]

Judge's certificate that question of jurisdiction is at issue

Filed April 13, 1925

In this cause and action, I hereby certify that the judgment herein made and entered was duly excepted to by said defendant United States of America within apt time; that by its demurrer filed herein, the question of the jurisdiction of this court alone was and is in issue and alone was considered and determined by the court upon the petition, complaint, or declaration of the above-named defendant, there being no question as to the amount involved in the said

cause and action; and that, treating the said demurrer of the defendant as presenting the sole question of the jurisdiction of this court, this court held that it had jurisdiction of the subject matter of this cause; and that treating said demurrer as presenting the sole question of jurisdiction in this case arising under the provisions of the acts of Congress commonly known as the Tucker Act, and being subdivision 20 of section 24 of the Judicial Code of the United States, and particularly whether or not this action was upon a contract, express or implied with the United States not sounding in tort, said judgment was rendered and entered for said plaintiffs and against said defendant.

This certificate is made conformably to the provisions of section 238 of the Judicial Code of the United States; and I certify further that no opinion was filed herein to be made part of the record and to be certified and sent up as part of the proceedings together with this certificate.

Dater this 9th day of April, A. D. 1925, at the city of Albany in the State of New York, and within the limits of said Northern District of the State of New York.

FRANK COOPER,
District Judge Holding the District Court of the United States for the Northern District of New York.

[File endorsement omitted.]

28 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed April 13, 1925

To the clerk of the United States District Court within and for the Northern District of New York:

SIR: You will please incorporate the following record into the transcript of the record in the above-entitled cause and action, to be taken and which is taken by writ of error and proceedings in error to the honorable, the Supreme Court of the United States of America, from the judgment of the District Court of the United States within and for the Northern District of New York, made and entered in the above-entitled cause and action, last aforesaid, on or about the ninth day of March, A. D. 1925, in favor of said plaintiffs in said action last above named and mentioned and against the said United States of America and defendant, to wit:

1. The petition or complaint of said plaintiffs in said action in your said court;

29 2. The demurrer of the United States of America, said defendant, to said petition or complaint;

3. The said judgment of the said District Court of the United States within and for the Northern District of New York in said action and cause;

4. A statement that the exception to said judgment was made and taken in open court by said defendant.

As acknowledgment and proof of the service of this application and praecipe upon said defendants in error is herewith submitted.

5. No opinion was filed by the court or judge in said cause and action at any time.

Very respectfully,

By direction of the Attorney General:

OLIVER D. BURDEN,

United States District Attorney Within and for the Northern District of New York, Office and Post Office Address, Federal Building, Syracuse, New York.

Service of the above and foregoing praecipe and application is hereby acknowledged and admitted by me, at Albany, New York, this ——— day of ———, A. D. 1925.

———— ————,

Attorney for said plaintiffs Below and Defendants in Error in the Supreme Court of the United States, to wit, Samuel Gettinger and Harry Pomerantz, Trading Under the Firm Name and Style of The Paris Cloak & Suit Company, Office and Post Office Address, Number 82 State Street, Albany, New York.

[File endorsement omitted.]

30 In United States District Court

[Title omitted.]

Order extending time

Filed June 2, 1925

This cause having been on the calendar and brought to trial at the February, 1925, term of the court and held at Albany, New York, before the court, and the court having overruled the demurrer and found in favor of the plaintiff, and judgment therefore having been entered, and it appearing that owing to the misplacement of the records and files in this case, additional time is necessary for the preparation of the papers in this case, it is on motion of Oliver D. Burden, United States attorney,

Ordered, that said February, 1925, term of this court, and time of filing necessary papers be, and the same is hereby, extended until thirty days after notice of the decision in the case of Greenspan against United States or similar case now pending in the Supreme

Court of the United States, or not later than Jan. 1, 1926, for the purpose of filing a bill of exceptions, or other necessary papers on appeal, and all other purposes of said action, and this order be entered nunc pro tunc as of May 7, 1925.

Dated this 27th day of May, 1925.

FRANK COOPER,
U. S. District Judge

[File endorsement omitted.]

31 In United States District Court

[Title omitted.]

Stipulation to docket case

Filed January 30, 1926

It is hereby agreed by and between the respective parties to the above-entitled cause and action that the stipulation, heretofore entered into by and between said parties that this cause and action should be stayed until the decision of the Supreme Court of the United States of America in what is known as the Shenango Valley Grocery Company case against the United States of America, heretofore pending in the United States Court of Claims, presenting like questions as appear in this said cause, should be rendered, inasmuch as said Shenango Valley Grocery Company has abandoned its appeal or error proceeding from a decision adverse to it in said Court of Claims, is hereby withdrawn, abrogated, and annulled; and
32 in lieu thereof, the said cause above entitled shall be docketed in the said Supreme Court of the United States of America for decision therein upon the record in said cause, including the petition and complaint of the above-named plaintiffs, the demurrer thereto by the United States of America, and the judgment and orders of said District Court of the United States of America for the Northern District of New York, entered in said District Court against said defendant and in favor of said plaintiffs, for the sum or amount sued for in said action.

Dated this 28th day of June, A. D. 1926.

JOSEPH GREENBERG,
Attorney for Said Original Plaintiffs,
Office and Post Office Address 82 State Street, Albany, N. Y.

OLIVER D. BURDEN,
United States District Attorney for the Northern District of New York, Attorney for Said Original Defendant, United States of America. Office and Post Office Address, Federal Building, Syracuse, New York.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

In the Supreme Court of the United States

Statement of points to be relied upon and designation to print the entire record

Filed August 2, 1926

The plaintiff in error states that it intends to rely on its writ of error on the following points:

1. That the District Court of the United States for the Northern District of New York was without jurisdiction to enter the judgment sought to be reviewed, as the cause of action set forth therein if based on an implied contract, was based upon a contract implied in law and not upon a contract implied in fact.

2. That the cause of action is essentially one sounding in tort, which the District Court of the United States was without jurisdiction to entertain.

3. That in the absence of legislation conferring jurisdiction on the District Court it was without jurisdiction to entertain this cause of action.

The plaintiff in error further states that the entire record as filed in this court is necessary for the consideration of the points stated.

Respectfully submitted,

WILLIAM D. MITCHELL,
Solicitor General.

[File endorsement omitted.]

(Indorsed on cover:) File No. 32104. N. New York. D. C. U. S. Term No. 537. The United States of America, plaintiff in error, vs. Samuel Gettinger and Harry Pomerantz, trading under the firm name, etc. Filed July 29th, 1926. File No. 32104.

○

[redacted]

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the Act of February 13, 1925, c. 229, 43 Stat. 936, took effect.

STATEMENT

This case presents the question whether the District Court had jurisdiction to give judgment against the United States for the amount of a fine paid by the defendants in error in a previous criminal proceeding for violation of statutory provisions which were subsequently declared by this Court to be unconstitutional and void.

In February, 1920, the defendants in error were indicted in the United States District Court for the Northern District of New York for violation of Section 4 of the Food Control or Lever Act of August 10, 1917, c. 53, 40 Stat. 276, 277, as amended by Section 2 of the Act of October 22, 1919, c. 80, 41 Stat. 297, 298, in making unjust and unreasonable rates or charges in selling women's apparel. The defendants in error first pleaded not guilty, but later, in October, 1920, withdrew those pleas and entered pleas of nolo contendere. (R. 1.)

The plea of nolo contendere entered by Gettinger, omitting the caption, date, signature, and verification, was as follows (R. 3):

> In consideration that the Attorney General and this court shall accept the plea nolo contendere which I hereby tender to the above-entitled indictment, I do hereby waive any and all claims which I now have or hereafter may have to any and all fines which the court may see fit to impose upon me upon

> such plea, except in the event that the so-called Lever Act under which said indictment is founded shall be declared unconstitutional by the Supreme Court of the United States.

The plea entered by Pomerantz was substantially similar. (R. 4.)

The court thereupon sentenced the defendants in error to pay a fine of five thousand dollars, which they paid to the clerk of the court, and which was by him deposited to the credit of the Treasury of the United States. (R. 2.)

Subsequently, in 1921, this Court in the case of the *United States* v. *L. Cohen Grocery Company*, 255 U. S. 81, held that the statutory provisions under which the defendants in error were indicted and fined were unconstitutional and void. Thereafter, in 1924, three and one-half years after the sentence was imposed, the District Court entered an order holding the indictment against the defendants in error null and void, and vacating, setting aside and holding for naught the pleas of nolo contendere which had been entered by the defendants in error. (R. 2.)

The defendants in error then brought this suit against the United States to recover the amount of the fine paid by them. (R. 1–4.) The United States demurred to the bill of complaint. (R. 4.) The District Court overruled the demurrer, and, the United States not desiring to plead over, a

motion made by the defendants in error for judgment on the pleadings was granted. (R. 5–6.)

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

The contention of the United States is that the District Court erred in entertaining jurisdiction of the cause of action herein and in entering the judgment against the United States sought to be reviewed. (R. 9, 14.)

SUMMARY OF ARGUMENT

It may be admitted that the fine paid by the defendants in error was unlawfully exacted and that the Government was unjustly enriched by the receipt thereof. But the claim of the defendants in error is one sounding in tort, based upon a contract implied in law and not upon a contract implied in fact, and therefore the District Court had no jurisdiction. The case is governed by the decisions of this Court in *United States* v. *Minnesota Mutual Investment Company,* No. 348, October Term, 1925, decided May 24, 1926, and *United States* v. *Holland-American Lijn,* 254 U. S., 148. The attempt of the District Court to set aside the indictment and the pleas of nolo contendere entered thereto, whether effective or not, adds nothing to the rights of the defendants in error. The acceptance of the pleas which waived all rights except in the event that the Lever Act should be declared unconstitutional was not a contract to repay the amount of the fine in the event of such declaration of unconstitutionality. Moreover, neither the attorney for the

Government nor the court would have had power to make such a contract. The money, having passed into the Treasury of the United States, was beyond the legal control of the court or anyone else but Congress.

ARGUMENT

THE CLAIM OF THE DEFENDANTS IN ERROR IS ONE SOUNDING IN TORT, BASED UPON A CONTRACT IMPLIED IN LAW AND NOT UPON A CONTRACT IMPLIED IN FACT, AND THEREFORE THE DISTRICT COURT HAD NO JURISDICTION

Since the statutes under which the defendants in error were indicted and fined were unconstitutional, it may be admitted that the fine was unlawfully exacted and that the Government was unjustly enriched by the receipt of the fine. But Congress has not given any court jurisdiction of claims against the United States based on wrongful acts of its officers or on unjust enrichment. To give the Court of Claims, or a District Court, jurisdiction of a suit against the United States, "the demand sued on must be founded on a convention between the parties—'a coming together of minds.'" *Russell* v. *United States,* 182 U. S. 516, 530.

The claim of defendants in error in the present case is substantially similar to the claim which was considered by this Court in *United States* v. *Minnesota Mutual Investment Company,* No. 348, October Term, 1925, decided May 24, 1926. In that case it appeared that the Investment Company, in cer-

tain litigation between it and one McGirr and others, had been required to deposit certain money in the registry of the United States District Court for Colorado and that the clerk of the court had deposited such money in a bank designated by the court as one of its depositaries. The money remained in the bank to the credit of the court from June, 1918, until May, 1920, when it was returned to the Investment Company. During that period the bank paid interest on the deposit at the rate of two per cent per annum to the Treasurer of the United States for the use of the Government, pursuant to a regulation issued by the Secretary of the Treasury which required all United States depositories having court funds on deposit to make such interest payments.

The Investment Company sued the United States for the interest received by it. The court below found that the Secretary of the Treasury had no power to direct national banks to pay interest on deposits of court funds to the United States, and that his authority to make such a regulation for interest extended only to public moneys and not to court funds belonging to the parties to a litigation and awaiting adjudication as to ownership or proper disposition. The conclusion of the court below was that the United States had therefore received interest which should have been paid to the Investment Company and which it might recover from the United States.

This Court reversed the judgment of the court below, saying:

> But the Solicitor General argues that even if the United States had no right to collect the interest from the Bank, no cause of action was created in favor of the Investment Company against the United States for this illegal collection, that there was no contract of the Government, express or implied, by reason of that collection to pay it to the Investment Company, and that without this, no recovery can be had. This seems to us to be sound reasoning. An implied contract in order to give the Court of Claims or a district court under the Tucker Act jurisdiction to give judgment against the Government must be one implied in fact and not one based merely on equitable considerations and implied in law. *Merritt* v. *United States*, 267 U. S. 338, 340, 341; *Tempel* v. *United States*, 248 U. S. 121; *Sutton* v. *United States*, 256 U. S. 575, 581. There is nothing in the averments in the pleadings in this case to show that the officers of the Government collected this interest or that it was received into the Treasury for the benefit of the Investment Company.

It is clear that in the present case, as in the *Minnesota Mutual Investment Company case*, recovery is sought on a contract based merely on equitable considerations and implied in law and not on any contract implied in fact. In the *Minne-*

sota Mutual Investment Company case the Court did not find it necessary to determine whether the regulations issued by the Secretary of the Treasury were valid because there could be no recovery even if they were invalid; in the present case the defendants in error point to the invalidity of the sections of the Lever Act under which they were indicted and fined. In the *Minnesota Mutual Investment Company case* the contention was that the invalidity of the regulations made it inequitable for the United States to retain the money obtained thereunder, and that there was, therefore, an implied contract to refund it; in the present case the defendants in error seek to base a similar contention on the invalidity of the statutory provisions.

The case of *United States* v. *Holland-American Lijn*, 254 U. S. 148, was also similar to the present case. That was a suit brought in the Court of Claims by the Holland-American Line to recover from the United States for the cost of maintenance and medical care furnished by the United States for certain aliens brought by the plaintiff to this country on the steamers of its line which it had been required by the immigration officials to pay. After quoting from the opinion in *Basso* v. *United States,* 239 U. S. 602, the Court said (p. 155):

> The principle, reaffirmed in the case just quoted, is applicable here for the reason that the claim presented sounded in tort, and was

> in substance an action to recover for the wrongful acts of the United States officials in compelling the claimant to pay under duress and without authority of law the sums sued for. Following the well-established construction of the Tucker Act, as declared in many cases in this court, we think that the Court of Claims should have dismissed the petition because it presented a claim not within its jurisdiction.

There are two District Court opinions which have discussed the questions here under consideration. In *Blumenthal* v. *United States,* 4 F. (2d) 808, Judge Bledsoe in the District Court for the Southern District of California, held that the plaintiff could not recover from the United States the amount of a fine imposed in a previous criminal prosecution for violation of the sections of the Lever Act, as amended, subsequently declared unconstitutional. In *Sultzbach Clothing Co.* v. *United States,* 10 F. (2d) 363, Judge Hazel held in the District Court for the Western District of New York that the plaintiff could recover in such a case.

Both of these cases were decided before the decision of this Court in the *Minnesota Mutual Investment Company case.* In the *Blumenthal case* Judge Bledsoe based his decision partly on the *Holland-American Line case.* In the *Sultzbach Clothing Co. case* Judge Hazel relied primarily on *Dooley* v. *United States,* 182 U. S., 222. He

attempted to distinguish the *Holland-American Line case* as follows (p. 365):

> *U. S.* v. *Nederlandsch, etc.*, 254 U. S. 148, 41 S. Ct. 72, 65 L. Ed. 193, upon which the government places reliance, is believed distinguishable, since there the substance of the asserted claim was not based on implied contract, but rested solely upon wrongful and tortious acts of officials acting "without authority of law in coercing the claimant to pay the sums demanded." The case was deemed different in character from the *Dooley Case* in that it involved an unauthorized wrong inflicted through judicial forms by federal officials, while the *Dooley Case*, related only to the exaction of duties for governmental purposes.

This very statement of the distinction between the *Holland-American Line case* and the *Dooley case* indicates that the question presented in the present case, and which was presented in the case before Judge Hazel, should be decided by applying the rule of the *Holland-American Line case* and not that of the *Dooley case*. The present case involves an unauthorized wrong inflicted through judicial forms by federal officials, and not an exaction of duties or taxes for governmental purposes.

That the District Court attempted to set aside the indictment of the defendants in error and the pleas of nolo contendere entered thereto (R. 2) has no bearing upon the rights of the defendants in error. Whether the court had power to do this

several years after the entry of judgment in the criminal proceedings may be doubted. *Bronson* v. *Schulten*, 104 U. S. 410; *United States* v. *Mayer*, 235 U. S. 55. But in any event such action by the court, whether effective or not, neither adds to nor subtracts from the rights of the defendants in error in this case. The statutory provisions upon which the indictment was based having been declared unconstitutional, the indictment was a nullity and the defendants in error were improperly fined. No further action by the court was necessary to bring about this condition. But the result is merely that the defendants in error are perhaps entitled on equitable considerations to be repaid the amount of the fine paid by them.

It can not be seriously urged that either the attorney for the Government or the court by accepting the pleas of nolo contendere, which waived all rights—

> except in the event that the so-called Lever Act under which said indictment is founded shall be declared unconstitutional by the Supreme Court of the United States

contracted on behalf of the United States to repay the fine in the event of such declaration of unconstitutionality. The exception in the plea was not an agreement by anyone to do anything; it was a mere protest by the defendants in error. Its effect at most was to prevent the defendants in error from being estopped by their voluntary entry of the pleas and payment of the fine from asserting rights

they might otherwise have had. Moreover, it seems entirely clear that neither the attorney for the Government nor the court would have had power, even if they had so desired, to contract on behalf of the United States to repay the amount of the fine upon the happening of some future contingency. Their duty was to enforce the law as it was then supposed to exist, and to impose such fines as were then supposed to be proper. Once judgment had been entered and the fine paid, their functions had been completed, and the fact that they were instrumental in collecting the fine clearly gave them no right to contract for its withdrawal from the Treasury at some indefinite time in the future upon the happening of some contingency. The money, having passed into the Treasury of the United States, was beyond the legal control of the court or of anyone else but Congress. *Ex parte Lange,* 18 Wall. 163, 175. As said by this Court in *Hooe* v. *United States,* 218 U. S. 322, 333–334:

> It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation. * * * If an officer, upon his own responsibility and without the authority of Congress, assumes to bind the Government, by express or implied contract, to pay a sum in excess of that limited by Congress for the purposes of such a contract, the contract is a nullity, so far as the Government is concerned, and no legal obligation arises upon its part to meet its provisions.

If the circumstances justify such a course, Congress in its discretion can intervene and do justice to the owner of private property used by officers of the Government in good faith for public purposes, although without direct legislative authority. The plaintiffs' remedy is in that direction.

CONCLUSION

The judgment of the District Court should be reversed.

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NOVEMBER, 1926.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1926.

No. 537.

UNITED STATES OF AMERICA,
Plaintiff in Error,

against

SAMUEL GETTINGER and HARRY POMERANTZ, Trading Under the Firm Name, Etc.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

ARGUMENT.

The question is whether a party indicted and fined under a statute later held by this court unconstitutional is entitled, after the court which pronounced sentence has set aside the proceedings on that ground, to have the amount of the fine so imposed and paid refunded to him by suit in the District Court of the United States exercising concurrent jurisdiction with the Court of Claims.

The District Court for the Northern District of New York answered this question in the affirmative. It is submitted that this judgment was correct and should be affirmed.

If this question had arisen while the money realized from the fine was still in the possession of the marshal or in the registry of the court it would on application have been refunded upon a simple order of the District Court.

In *Osborn* v. *United States*, 91 U. S. 471, the United States District Court for Kansas decreed the condemnation and forfeiture to the United States of certain securities and other property for participation in insurrection against the United States on the part of the owner. None of the moneys received were paid into the Treasury of the United States but were deposited in a banking house at Leavenworth, or otherwise kept under the control of the court. While so held, the owner received a pardon from the President for all his offenses. This court held that the pardon remitted all consequences of the offense and required a restoration of the property to the owner by order of the court under whose control the property remained.

The court by Mr. Justice Fields said, pp. 478, 479:

> "The petitioner being restored by the pardon to his rights in the proceeds of the property forfeited, after deducting from them the costs of the legal proceedings, naturally invoked the aid of the court in which the proceedings were had, or to which they were transferred, for restitution of the proceeds. Proceedings in confiscation cases are required by the statute to conform as nearly as may be to proceedings in admiralty or revenue cases; and in admiralty it is the constant practice for persons having an interest in proceeds in the registry of the court to intervene by petition and summary proceedings to obtain a delivery of the

moneys to which they are entitled. The forty-third admiralty rule recognizes this right; and in cases without number the right has been enforced. The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid. If from any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution. In the present case, it is no answer to the order for restitution that the appellants received the moneys they obtained as officers of the court, and that they have long since ceased to be such officers. If the moneys were illegally taken, they must be restored; and, until a decree of distribution is made and enforced, the summary power of the court to compel restitution remains intact. The power could be applied in no case more fittingly than to previous officers of the court."

True, that was a case in which the proceeds remained under the control of the court. The decree for the condemnation of the property was warranted by law at the time it was pronounced. It was subsequently invalidated by a presidential pardon of the offenses.

In this case the sentence was unwarranted and void when originally pronounced. The money has been paid into the Treasury of the United States. The court having pronounced the sentence has no power by simple order to restore it to the party from whom it was thus unconstitutionally taken. The law (Judicial Code, Sec. 24, Par. 20) confers upon the District Court jurisdiction concurrent with that of the Court of Claims to give judgment against the United States. The only difference is that if the money was still in the registry

of the court it needed only a simple order of the court in the same proceeding to restore it, while in the present situation it takes an independent suit to accomplish the same result. It remains true that in this case, as in the *Osborn* case the plaintiffs "naturally invoked the aid of the court in which the proceedings were had" "for restitution of the proceeds." (91 U. S. 478.)

In *United States* v. *State Bank*, 96 U. S. 30, gold certificates belonging to a bank were deposited in a subtreasury in pursuance of a fraudulent scheme by which it was later to be withdrawn. The bank which was the actual owner of the gold represented by the certificates was held entitled to recover the amount which had thus found its way into the Treasury of the United States.

The court said (pp. 35, 36):

> "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. *Bayne, et al., Trustees* v. *United States*, 93 U. S. 642.
>
> * * * * * * * *
>
> "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved."
>
> * * * * * * * *
>
> "But surely it ought to require neither argument nor authority to support the proposition,

> that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party."

In *United States* v. *Winchester*, 99 U. S. 372, the United States District Court for the Southern District of Illinois, condemned as prize of war cotton seized on land by the naval forces of the United States operating on the Mississippi River. One-half of the proceeds were paid into the Treasury of the United States. The other half was distributed among the captors by decree of the Supreme Court of the District of Columbia.

The owner of the cotton sued for the entire proceeds. The majority, consisting of three judges, awarded him the entire proceeds (14 C. Cls. 13), while two judges (51-57) held that he was entitled only to the half that had been paid into the Treasury of the United States.

On appeal this court affirmed the judgment as rendered. The court, by Mr. Justice Field, said (99 U. S. 374):

> "Treating the proceedings in the District Court as in admiralty, they are without validity. The admiralty jurisdiction of the District Court extends only to seizures on navigable waters, not to seizures on land."

Touching the half which had been distributed to the captors by decree of the District of Columbia Court the opinion concludes (p. 377):

> "But as the Illinois court had no jurisdiction to award to the admiral or his captain the money thus generously distributed, we are of opinion that

> the claimant must have judgment for the amount as well as for the other moiety of the proceeds of the cotton belonging to the estate of his testator."

In *Dooley* v. *United States*, 182 U. S. 222, this court held that the District Court should give judgment for the amount of duties exacted upon goods brought in from Porto Rico as imported from a foreign country on the ground that Porto Rico was not legally a foreign country and that the tariff acts had no application. That, as the present case, was a suit where a District Court was exercising jurisdiction concurrent with that of the Court of Claims.

The distinction between such a case in which the Treasury had been enriched by money belonging to a claimant and that of a mere tort committed by an officer of the United States was clearly pointed out, p. 228. Many cases were referred to, pp. 228-230, in which recovery had been similarly sustained in the Court of Claims for money which had gone into the Treasury of the United States to which a claimant in the Court of Claims had a superior right.

Armstrong v. *United States*, 182 U. S. 243, made the same ruling in a suit brought in the Court of Claims for the recovery of duties illegally exacted in the same way.

In *United States* v. *Buffalo Pitts Company*, 234 U. S. 228, a party furnishing an engine to be used in the performance of an engineering contract by the Government was held entitled to recover its value in a District Court acting concurrently with the Court of Claims where the Government had seized the engine upon default of the principal contractor claiming a right to do so under a clause of the contract.

In *United States* v. *Emery*, 237 U. S. 28, suit was brought in a District Court, acting concurrently with

the Court of Claims, to recover internal revenue taxes paid under protest. This court upheld the jurisdiction of the District Court over such cases, saying, by Mr. Justice Holmes, pp. 31, 32:

> "The objection to the jurisdiction pressed by the Government is that the only remedy is a suit against the Collector. As the United States has received and keeps the money and would indemnify the Collector if he had to pay, Rev. Stat. 3220, the least that can be said is that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims. It is true that this tax law provides that 'all laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable' &c., are extended to this tax, c. 61, Sec. 38, 36 Stat. 11, 117, but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make that remedy exclusive. The right to sue the Collector for an unjustified collection was given by the common law.—The jurisdiction over suits against the United States under Sec. 24, Twentith, of the Judicial Code, extends to 'all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress.' However gradually the result may have been approached in the earlier cases it now has become accepted law that claims like the present are 'founded upon' the revenue law. The argument that there is a distinction between claims 'arising under' (Judicial Code, Sec. 24, First) and those 'founded upon' (id. Sec. 24, Twentieth), a law of the United States, rests on

the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye."

Decisions of the Court of Claims.

The right to recover back a fine unlawfully imposed in a criminal proceeding has been sustained by the Court of Claims in two well considered cases.

In *Devlin* v. *United States,* 12 Ct. Cl. 266, it appeared from the findings of the court that the petitioner who was a citizen of the State of New York was arrested in Brooklyn for the forgery and sale of fraudulent papers and certificates of enlistment into the United States Navy and for other offenses, and was thereafter tried before a military commission convening in Washington and found guilty and sentenced on April 5, 1865, to be imprisoned for a period of ten years and to pay a fine of ten thousand ($10,000) dollars and to be imprisoned until the fine be paid. The superintendent of the prison took from the petitioner bonds which were for the sum of $14,956.25 and from that amount ten thousand ($10,000) dollars was applied towards payment of the fine and was turned into the Treasury of the United States, the balance being returned. Later it was developed by the decision of the Supreme Court in another case (Ex parte Milligan, 1 Wall 1), that the military commission had not jurisdiction in the case and that therefore all other proceedings were void. The Court of Claims in a suit to recover the money, speaking through Loring, J., stated:

> *"It follows as a consequence that the United States had no legal title to the property of the petitioner which they received, and that it was*

appropriated to the fine illegally imposed upon him without right, and that they hold it now as his property."

"As this sentence was illegal, it forms no objection to the recovery of more. And it is not shown or suggested that the United States received any profits from this $10,000 while it was in their possession, and the petitioner's loss has benefited the United States in no way, for when the securities were sold they became debtors, according to their tenor, to the holders of them, instead of to the petitioner.

As the status of the United States was that of a depositary only, this suit is in the nature of an action of indebitatus assumpsit for 'money had and received' and in such a suit, by the statute, the United States are not liable for interest.

It was contended for the defendants that the money claimed could not be recovered because paid by the petitioner voluntarily and without duress, and on account of the fine, and that this was shown by his letter of July 28, 1872.

But the petitioner did not make any payment. The proceeds of his property came to the Treasury without any act of his, and its officers retained the $10,000. There is nothing in the case to show or suggest that he parted with his property voluntarily, or in payment of the fine; that is not found in the statement of facts; and his property was taken from him before he was sentenced, or the fine imposed; and his letter only asks for a 'receipt for a payment of the fine of $10,000 imposed' as a 'voucher for the future;' and this, so far from expressing any assent to what had been done, only asks for evidence which was proper to support this proceeding.

Besides, it was a part of his sentence that he should not be released till his fine was paid, and with this provision the release of the ten years' imprisonment had nothing to do. He was, therefore, by his sentence, under duress till the fine was paid, and its payment in such way as the officers of the United States who held his property should choose was the only means by which he could or did obtain his liberty."

In *Basso* v. *United States*, 40 C. Cls. 202, claimant was fined $1,500 by the provisional court of Porto Rico for smuggling goods from the United States into that island after it had become American territory.

The court said in language so applicable to this case that it is fully quoted (pp. 213, 214):

"The case then frees itself to the single point that at the time of the alleged violation of the statute in question, April 29, 1899, the scissors which plaintiff was charged with smuggling were entitled to free entry, and the regulation of the War Department in respect to the collection of customs tariff did not apply to such merchandise. At the time of the alleged offense and at the time of plaintiff's conviction there was in fact no criminal offense of the kind with which plaintiff was charged and convicted. The statutes limiting and defining the criminal jurisdiction of the provisional court did not extend to or create the offense with which plaintiff was charged and convicted, and for which a penalty was imposed upon him for the omission to do that which he was not obligated to do either by the statute referred to in the complaint or by the regulation of the War Department. The subject-matter of its judgment

never having been confided to it, the court was without jurisdiction, and its judgment was void. The jurisdiction of a court can never depend upon its own decision upon the merits of a case brought before it, but upon its right to hear and decide it at all. (*Ex parte Watkins*, 7 Pet. 568.) If there is a total want of jurisdiction the proceedings are void and afford no justification, and may be rejected when collaterally drawn in question. (*Thompson* v. *Tolmie*, 2 Pet. 157; *Rose* v. *Himely*, 4 Cranch, 241; *Griffith* v. *Frazier*, 8 Cranch, 9.) Although a court may have jurisdiction over the parties and subject-matter, yet if it make a decree which is not within the powers granted to it by the law of its organization, its decree is void. (*United States* v. *Walker*, 109 U. S. 258.) Where a court is without jurisdiction it cannot make any order in a cause, except to dismiss the suit, but may set aside orders made before the want of jurisdiction was discovered. (*New Orleans and B. S. Mail Co.* v. *Fernandez*, 12 Wall. 130.) Courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws or treaties of the United States (148 U. S. 197), and the criminal jurisdiction of their courts is wholly derived from statutes of the United States. (*Manchester* v. *Mass.*, 139 U. S. 240.)

"Treating the judgment of the provisional court as void, as it must be, the fact results that the penalty of $1,500 exacted was without legal warrant. No greater right existed to demand a penalty for the nonpayment of a customs duty than for the payment of the duty itself. There was no authority of law to demand the one or the

other. The defendant received and still retains it. Is there any reason it should not be refunded to plaintiff? There is none in legal contemplation nor in good morals."

A subsequent unsuccessful attempt of the same party to recover damages for his illegal imprisonment arising out of the same sentence as a tortious act giving rise to damages against the United States (*Basso*, 49 C. Cls. 700, 239 U. S. 602), only emphasizes his right sustained by the Court of Claims to recover back the amount of the fine which had gone into the Treasury of the United States.

DECISIONS OF OTHER FEDERAL COURTS.

United States v. *Rothstein*, 187 Fed. 268 (C. C. A. 7th Circuit, 1911), involved the same question as here, the right to recover back a fine paid under sentence of a court after the act under which the fine was imposed and paid is held unconstitutional by this court.

Here, as in that case, the District Court sitting as a criminal court, had, after being informed by decision of this court that the act involved was unconstitutional, set aside the indictment and all proceedings thereunder as null and void (rec. Par. Sixth of petition, p. 2).

The Circuit Court of Appeals upheld the action of the District Court in setting aside the indictment and all proceedings thereunder, and in giving judgment for the recovery of the fine.

It said (p. 270):

"Rothstein's position is this: The conviction was a nullity. 'An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment.' *Ex parte Siebold*,

100 U. S. 373, 25 L. Ed. 717; *Ex parte Yarbrough*, 110 U. S. 654, 4 Sup. Ct. 152, 28 L. Ed. 274; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868. After the expiration of the term at which it is entered, a void judgment may lawfully be cancelled on motion and notice. *Ex parte Crenshaw*, 15 Pet. 119, 10 L. Ed. 682.

"If Rothstein's contention as to the law determinative of the validity of the order of July, 1909, is correct, confessedly the judgment would have to be affirmed. If his argument is wrong, it is so because the government's insistence that the judgment of conviction was not open to a collateral attack is right. But this writ does not bring here the order of July, 1909, for review on assignments of error. It is addressed to a judgment of the District Court, sitting as a court of claims, wherein the court found that in and by the order of July, 1909, the District Court, sitting as a criminal court, had adjudged that Rothstein's conviction was based on an unconstitutional statute, that the unconstitutional statute never was a law, that the conviction was a nullity, and that, therefore, it was within the power and duty of the criminal court to cancel the void judgment of conviction and order the restitution of the fine. It was on these facts that the District Court, as a court of claims, rendered the judgment now on review. This writ of error therefore involves a collateral attack upon the order of July, 1909. For the government to succeed, that order must be, not merely erroneous, but absolutely void. Now, if a conviction under an unconstitutional statute is a nullity, the court on motion and notice and hearing would have jurisdiction after the term to expunge the void

judgment; and the order of expungement would not only be within the court's power, but would be errorless."

Saltzbach Clothing Co. v. *United States,* 10 Fed. (2d) 363, District Court, Western District of New York, was, like the present, a suit to recover back a fine imposed and paid under the same Section 4 of the Lever Act, held void by this court in *United States* v. *Cohen Grocery Co.,* 255 U. S. 81. The court in an able opinion by Judge Hazel sustained the claim and denied a motion by the United States to dismiss the complaint.

The whole opinion is so precisely in point that we do not quote from it, but refer the court to it as a forcible statement of the grounds relied upon for recovery of the fine.

The same is true in a recent decision of the United States District Court for the Southern District of New York by Judge Augustus N. Hand in the case of *Compagnie Generale Transatlantique* v. *United States.* This opinion has not yet appeared in the Federal Reporter. A certified copy has been filed and is annexed as an appendix to this brief. In that case a fine was imposed by the executive authority and was paid by the claimant for alleged violation of the immigration laws. It was held that the company was entitled to recover back the amount of the fine.

In both of these last cited cases the respective courts had before them the decision of this court in *United States* v. *Holland-America Line,* 254 U. S. 148. They distinguished the respective cases before them from that one which was based upon purely wrongful acts of United States officials in compelling the claimant to pay under duress the sums sued for.

Another case which must be distinguished from the present case is the recently decided case of *United States* v. *Minnesota Mutual Investment Company,* decided May 24, 1926, where the Government earned interest on money paid into court. The money was not paid into the Treasury by the claimant in that case or for its use.

In the present case the money was paid directly by the present claimant to the Clerk of the Court as agent of the United States and by him as required by law placed in the Treasury. The court imposing the fine being subsequently informed by decision of this court that the statute under which it had acted was unconstitutional and void very properly set aside the indictment and all proceedings thereunder as null and void. Such action was not only in conformity with the decision of this court in *United States* v. *Cohen Grocery Company,* 255 U. S. 81, but was only in accordance with due respect for the opinion of this court on a question of constitutional law. Its subsequent action in giving judgment in the present suit in favor of the claimant for the amount of the fine was in pursuance of the decision of this court in the *Cohen* case and of its own action in setting aside the indictment against these claimants.

In the present case there is an additional circumstance which did not apparently exist in any of the other cases cited. Both defendants in the indictments (claimants in the District Court and Defendants in Error here) in their pleas of *nolo contendere* (rec. pp. 3, 4) made such pleas conditional. They waived their rights only except in the event that the Lever Act under which the indictments were founded "shall be declared unconstitutional by the Supreme Court of the United States."

It was on this plea that the claimants were fined $5,000 and sentenced to be confined in jail until the fine was paid. It was in a spirit of the utmost good faith that the District Court in 1924, doubtless moved in some degree by its own acceptance of that plea, vacated and set aside the indictment. (Par. Sixth of petition, rec. p. 2.)

A condition like this accompanying a plea was perhaps not in itself valid. Yet the subsequent action of the court in setting aside the sentence was such an acceptance of it by the court that the order setting it aside must be deemed to have been made in pursuance of an understanding at the time of the plea and sentence that it was to be set aside in case of a subsequent declaration of the unconstitutionality of the act.

In *ex parte Lange*, 18 Wall. 163, a sentence imposing a fine *and* imprisonment where the statute permitted only fine *or* imprisonment was held void as to the imprisonment after the fine had once been paid. The court said (p. 175):

> "A judgment may be erroneous and not void, and it may be erroneous *because* it is void."

Again (p. 176):

> "The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."

Much more clearly must it be true that where the whole sentence is unwarranted by the Constitution, the money must be deemed to have been paid into the Treasury for the benefit of the person paying it.

His suit for it in this case is in the nature of an action for money had and received, such as was sus-

tained against the United States in *United States* v. *State Bank*, 96 U. S. 30, above cited, or in favor of the United States in *Bayne* v. *United States*, 93 U. S. 642.

CONCLUSION.

The judgment of the District Court should be affirmed.

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APPENDIX.

Compagnie Generale Transatlantique v. United States.

Augustus N. Hand, District Judge:

The first of the above two actions was brought to recover $200, which was paid to the Collector of Customs for the Port of New York to be held as a special deposit pending determination by the Secretary of Labor as to the assessment of a fine amounting to $200 on account of bringing an illiterate alien to the United States. This alien was at first excluded as illiterate by the Inspection Officers of the United States Immigration service, but thereafter granted permanent admission.

The plaintiff paid the said sum over to the Collector as an alternative to threatened refusal of clearance of its vessel unless and until such payment was made. Thereafter the Collector acting pursuant to an order issued at the direction of the United States Secretary of Labor, and at the special instance and direction of the Commissioner of Immigration for the Port of New York, paid the said sum of $200 into the Treasury of the United States as an alleged immigration fine. The payment into the Treasury was made because the defendant was unmindful of the permanent admission of the alien.

Section 9 of the Immigration Laws provides that if it shall appear to the satisfaction of the Secretary of Labor that the illiteracy of an immigrant might have been detected by the exercise of reasonable precaution prior to the departure of such alien from a foreign port, such person shall pay to the Collector of Customs District in which the port of arrival is located the sum of $200 for each violation. The section also says that:

> "no vessel shall be granted clearance papers pending the determination of the question of the liability to the payment of such fines, or while the fines remain unpaid, nor shall such fines, be remitted or refunded: Provided, that clearance may be granted prior to the determination of such questions upon the deposit of a sum sufficient to cover such fines."

The second case contains three causes of action. The first alleges that the plaintiff brought to the United States an alien named Taboada who was ordered excluded and deported by the Secretary of Labor on the ground that he was a quota immigrant and not a non-quota immigrant as specified in his visa. The plaintiff was advised by the Commissioner of Immigration that upon the disclosed facts a fine of $1,000 had been incurred, and gave plaintiff thirty days within which to submit evidence to show why such fine should not be collected. That plaintiff submitted such evidence showing that he came under Section 4-b of the Immigration Law and was

> "An immigrant previously lawfully admitted to the United States who is returning from a temporary visit abroad."

That thereafter, notwithstanding the alien was returning from a temporary visit abroad, the plaintiff was notified by the defendant that the Secretary of Labor had directed that a fine be imposed, which fine of $1,000 was paid to the Collector of Customs under protest solely to avoid damage due to delay or refusal of clearance of the plaintiff's vessel.

It is further alleged that no statute of the United States was violated and that the act of the Secretary of Labor in imposing a fine was without lawful authority

and arbitrary, and that the defendant received said money to the use of the plaintiff.

The second and third causes of action are similar in principle, though having somewhat different facts. The law under which the fines were imposed in the second case was Section 16 (a) and (b) of the Immigration Act of 1924 (Chap. 190, 43 Stat. 153, 163, 164), which reads as follows:

> "Sec. 16(a). It shall be unlawful for * * * any transportation company, * * * to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) * * * any quota immigrant having an immigration visá the visá in which specifies him as a non-quota immigrant.
>
> "(b). If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such transportation company, * * * shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, * * *. No vessel shall be granted clearance pending the determination of the liability * * * except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums." * * *

The actions are brought under the Tucker Act to recover money had and received to the use of the plaintiff. The Tucker Act provides (Judicial Code, Sec. 24:

> "The U. S. District Court shall have original jurisdiction as follows:
>
> "Twentieth—Concurrent with the Court of Claims of all claims not exceeding $10,000

> founded upon the Constitution of the United States or any law of Congress, or upon any contract express or implied with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable."

The basis of the within causes of action is a "law of Congress," so that the discussion in the briefs as to whether there can be a recovery upon an implied contract is unimportant. For a long time claims to recover taxes illegally exacted have been recoverable under the first class provided for by the Tucker Act. As Justice Holmes said in *United States* v. *Emery*, 237 U. S. 28, when discussing a case where it was sought to recover taxes paid under protest: "Claims like the present are founded upon the revenue law." To limit the recovery in cases "Founded" upon a law of Congress to cases where the law provides in terms for a recovery, would make that provision of the Tucker Act almost entirely unavailable, because it would allow recovery only in cases where laws other than the Tucker Act already created a right of recovery. "Founded" must, therefore, mean reasonably involving the application of a law of Congress. *Dooley* v. *United States*, 182 U. S. 222 is in accord with this reasoning. There custom duties were improperly exacted.

Justice Brown there said:

> "The first section" (of the Tucker Act) "evidently contemplates four distinct classes of cases: (1) those founded upon the Constitution or any law of Congress, with an exception of pension

cases; (2) cases founded upon a regulation of an Executive Department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases *not sounding in tort.* The words 'not sounding in tort' are in terms referable only to the fourth class of cases."

Now in the first case, the deposit of $200, was made by virtue of the provisions of Section 9 of the Immigration Laws, was simply to secure the government for a fine and was payable to the plaintiff as soon as a determination was made in favor of the admissibility of the alien. Here is one of the few cases where an Act of Congress, to wit: Section 9 of the Immigration Laws, itself creates a right in the plaintiff so that the cause of action asserted seems clear.

In the second cases all three causes of action are founded upon Sections 16 (a) and (b) of the Immigration Act of 1924, and fall directly within the principles laid down.

The issues in the first two causes of action are whether the immigrants were or were not returning from a temporary visit abroad, and in the third cause of action whether the immigrant was a temporary visitor, and consequently should have been properly admitted for a limited time.

The government strenuously insists that under the doctrine of *United States* v. *Holland-America Line,* 254 U. S. 148, the plaintiff cannot recover. I confess that I have had some difficulty in reconciling that decision with such cases as *Dooley* v. *United States,* 182 U. S. 222, and *United States* v. *Emery,* 237 U. S. 28. There seems to be a distinction however.

In the *Holland-America* case the government required a transportation company to pay certain hospital charges for maintaining immigrants and treating them prior to their examination by immigration officials. It is clear from reading the opinion in the court below (53 Court of Claims Rep. 522), that upon the admitted facts the statute under consideration had no application.

Section 16 of the Immigration Act of 1907 provides:

> "That where a suitable building is used for the detention and examination of aliens, the immigration officials shall there take charge of such aliens and the transportation companies * * * shall be relieved of the responsibility for their detention thereafter until the return of such aliens to their care."

It is apparent that the government officials in the *Holland-America* case were acting outside of the statute, because upon the finding of the Court of Claims, Ellis Island, constantly used for detention and treatment, was a "suitable building." In other words, the Immigration Law in no way applied to the facts. As Mr. Justice Day remarked (at page 153):

> "We think that the statement of the substance of the petitioner's claim, * * * shows that it rested upon payments alleged to have been made under duress because of the wrongful and tortious acts of officials of the United States Government acting without authority of law in coercing the claimant to pay the sums demanded."

In my opinion, the present case more nearly resembles actions like *United States* v. *Emery*, 237 U. S. 28, allowing recovery of taxes unlawfully exacted, than

United States v. *Holland-America Line* (*supra*), where upon the admitted facts there seems to have been scarcely any color of right in attempting to collect expenses of detention of aliens from the transportation company. As Mr. Justice Holmes said in the *Emery* case:

> "However gradually the result may have been approached in the earlier cases it now has become accepted law that claims like the present are 'founded upon' the revenue law. The argument that there is a distinction between claims 'arising under' (Judicial Code, Sec. 24, First), and those 'founded upon' (id. Sec. 24, Twentieth), a law of the United States, rests on the inadmissible premises that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye."

I can see no reason why the doctrine as to taxes should not be applied to penalties unlawfully exacted. The motions of the government to dismiss are accordingly denied.

July 6, 1926.

A. N. H.
D. J.

Certificate of Clerk of the District Court for the Southern District of New York as to the authenticity of above decision dated November 1, 1926.